Nos. 97-826, 97-829, 97-830, 97-831,
97-1075, 97-1087, 97-1099, 97-1141

Supreme Court, U.S.
FILED
MAY 18 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPPOSING BRIEF ON THE MERITS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*

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QUESTION PRESENTED

1. Whether the FCC's Rule 51.315(b) can require incumbent phone companies to provision certain existing combinations of network elements priced at cost pursuant to § 251(c)(3) where such provisioning: (1) is similar to the resale of incumbent services, which is governed by the wholesale pricing standard of § 251(c)(4); and (2) is inconsistent with the Act's purpose of encouraging competitive investment.

LIST OF PARTIES AND RULE 29 DISCLOSURE STATEMENTS

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit are listed in the captions of the decisions below. *See* AT&T Corp. Appendix ("Pet. App."). A, 1a-4a; Pet. App. D, 73a-79a; Pet. App. E.

The Rule 29 Disclosure Statements for the Association for Local Telecommunications Services, e.spire Communications, Inc. (formerly American Communications Services, Inc.), ICG Telecom Group, Inc, NEXTLINK Communications, Inc., and WinStar Communications, Inc. are set forth in the petition for a Writ of Certiorari in consolidated case No.97-830.

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OPPOSING BRIEF ON THE MERITS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*

STATEMENT

The Association for Local Telecommunications Services and certain of its members (hereafter "ALTS and its members") hereby oppose the briefs on the merits filed by AT&T, MCI, and the government concerning the FCC's Rule 51.315(b).[1] Congress created a distinction in the Telecommunications Act of 1996 between the purchase of network elements from incumbents at cost (47 U.S.C. § 251(c)(3)), and the purchase of resold incumbent services

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[1] ALTS is a national trade association representing facilities-based providers of competitive local telecommunications services.

at a wholesale discount (*id.* § 251(c)(4)). However, the FCC's Rule 51.315(b), which requires that all existing combinations of network elements be provided at cost, destroys this distinction in those situations where the combinations of network elements being purchased are functionally equivalent to or identical to resold incumbent services. ALTS and its members urge the Court to set aside Rule 51.315(b) because the Rule would "obliterate" the distinctions between sections 251(c)(3) and 251(c)(4) of the Telecommunications Act of 1996.

Accordingly, this Court's remand to the FCC needs to be clear that the Commission is free to craft a new rule addressing combinations that do not resemble resold incumbent services. ALTS and its members continue to support and endorse the positions of AT&T, MCI and the government concerning the FCC's jurisdiction, and the FCC's interpretation of 47 U.S.C. § 252(i). Brief of ALTS filed April 3, 1998, in No. 97-830.

Furthermore, the members of ALTS are currently making substantial capital investments in order to enter local telecommunications markets.[2] This investment is central to the 1996 Act's goal of: ". . . accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and service to all Americans . . . ."[3]

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[2] Local competitors have raised over $14 billion for local competitive investments since passage of the Telecommunications Act in February of 1996. Bear Stearns Report, March 1998.

[3] Joint Explanatory Statement of the Committee of Conference, H. Rep. No. 104-204, 104th Cong., 2d Sess. at 1 (1996).

The need to encourage this ongoing investment in competitive facilities is not vindicated by Rule 51.315(b). Therefore, ALTS and its members ask that Rule 51.315(b) be reversed and remanded to the FCC with instructions to preserve appropriate incentives for further competitive investments.

Competition Provisions of the 1996 Act

As part of Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), Congress enacted an additional subtitle to the Communications Act, 47 U.S.C. §§ 251-61, for the purpose of developing local competitive markets.[4] This portion of the 1996 Act establishes a framework whereby telephone customers eventually could choose their local carrier in the same way as they choose long distance providers today.

The 1996 Act imposes a duty on all incumbent local exchange carriers ("incumbents") to permit new market participants to utilize the incumbent's network and facilities in order to provide competing local service. In general, the 1996 Act provides three methods by which competitors can enter local telephone markets.

First, section 251(c)(2) directs incumbents to interconnect their local exchange networks with those of competing carriers at "rates, terms, and conditions" that are "just, reasonable, and nondiscriminatory," for the purpose of exchanging traffic with the competing providers.

Second, section 251(c)(3) requires incumbents to allow

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[4] H.R. Rep. No. 104-204, at 89 (1996).

new entrants to purchase, on an unbundled basis, separate elements of the incumbent local exchange carrier networks at "rates, terms, and conditions" that are "just, reasonable, and nondiscriminatory," and based on cost.

Third, section 251(c)(4) requires incumbents to offer to new entrants their retail exchange services at wholesale rates. Unlike the prices for unbundled elements, which section 251(c)(3) requires be "based on the cost ... of providing" the elements, the wholesale rates for resold services are determined "on the basis of the [incumbent's] retail rates charged to subscribers" minus only the expenses that "will be avoided" by selling at wholesale instead of retail.

Implementing Regulations

The FCC issued a notice of proposed rulemaking to implement the 1996 Act's requirements in accordance with section 251(d)(1) and the FCC's general rulemaking authority. In its *First Report and Order*[5], issued on August 8, 1996, the Commission adopted rules that detailed certain of the pricing and non-pricing requirements of sections 251(c) and 252.

An important issue in the Commission proceedings concerned the possibility that certain combinations of existing elements could be ordered that would be identical to resold services provided by incumbents, but priced at cost under section 251(c)(3) rather than at section 251(c)(4)'s standard for wholesale services. Both incumbents and facilities-based competitors pointed out that the availability of cost-based network elements pursuant to section 251(c)(3) was intended

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[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (Joint App. At 403).

to permit facilities-based competitors to "fill-in" portions of their networks, rather than to act as a lower-priced substitute for resold incumbent services. Pet. App. 235a-38a. Arguing that pricing resold services at the level intended for network elements would discourage competitive investments, these parties urged the FCC to adopt some means of preserving the statutory distinction between resale and network elements, such as a requirement that combinations resembling resold services be priced at the resale level rather than at cost.

Rejecting these views, the FCC adopted rules implementing section 251(c)(3), including Rule 51.315(b), under which new entrants could request any existing combination of unbundled elements, including combinations essentially identical to resold services.[6] Pet. App. 230a-33a.

The pricing standards which the Commission finally adopted to implement section 251(c)(3) were based upon forward-looking economic costing principles, and involved solely the pricing of bottleneck network elements from the incumbents.[7] Furthermore, the FCC declined to adopt specific rules as to several important cost determinations,

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[6] Rule 51.315(b) states: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent currently combines."

[7] *See, e.g., Local Competition Order* at ¶ 679: "Congress recognized in the 1996 Act that access to the incumbent LECs' *bottleneck facilities* is critical to making meaningful competition possible;" and at ¶ 740: "The just and reasonable rate standard of TELRIC plus a reasonable allocation of the joint and common costs of providing network elements that we are adopting attempts to replicate, with respect to *bottleneck monopoly elements*, the rates that would be charged in a competitive market" (emphasis supplied).

such as cost of capital, allocations of overhead costs, and depreciation.

The Eighth Circuit's Vacation of Rule 51.315(b)

In the decision under review, the Eighth Circuit held that the FCC had exceeded its jurisdiction by promulgating rules to implement the pricing requirements of sections 251(c) and 252(d) of the 1996 Act, as well as rules related to many non-pricing requirements. As a result, the Eighth Circuit vacated the FCC's rules covering pricing requirements of sections 251(c) and 252(d), including Rule 51.315(c)-(f). The Court held that the FCC had jurisdiction to issue interpretive rules concerning some subsections of section 252. 120 F.3d at 794-95 n.10. Pet. App. at 12a.

In particular, the Eighth Circuit affirmed the FCC's decision to require the provisioning of network elements that could be combined by a new entrant to form a service similar to an incumbent's resold service. Pet. App. at 53a-58a. Having vacated the requirement in Rule 51.315(c)-(f) that incumbents must combine elements upon a new entrant's request, the court concluded that the burden of recombination was adequate to preserve the statutory distinction between sections 251(c)(3) and 251(c)(4): "With resale, a competing carrier can avoid expending valuable time and resources recombining unbundled network elements." Pet. App. at 815.

After issuance of the Eighth Circuit's decision on July 18, 1997, a petition for rehearing was filed asking the court to specifically address Rule 51.315(b). On October 14, 1997, the Eighth Circuit granted the petition because: "To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one

hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Pet. App. at 71a.

The FCC's *Third Order on Reconsideration* in Its *Local Competition* Proceeding

While ALTS and its members joined other competitive carriers in a broad defense of the FCC's *Local Competition* rules at the Eighth Circuit, subsequent actions by the FCC altered ALTS' understanding of Rule 51.315(b), resulting in this challenge. A short explanation of how the developments informing ALTS' present position came about will assist the Court in its review.

Almost all new entrants have to obtain the bottleneck unbundled network elements needed to provision competitive local services from the incumbent local exchange carriers. However, ALTS' members also purchase and install a substantial portion of their own *non-bottleneck* facilities, such as local switches and certain transport facilities. In this regard they differ from many of the long distance companies, which have not invested to the same degree in local competitive facilities.

Congress clearly intended that the competitive local investments being made by ALTS' members would be furthered by the Commission's implementation of the 1996 Act.[8] First, because these new investments are based on

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[8] The Joint Explanatory Statement of the Committee of Conference describes the 1996 Act as creating: "a national policy framework designed to accelerate rapidly *private sector deployment* of advanced telecommunications and information technologies and service to all Americans . . . ." H. Rep. No. 104-204, 104th

(continued...)

state-of-the-art technology, they deliver advanced telecommunications services in a more efficient manner than existing facilities. Second, by creating alternative sources of supply, the existence of competitive facilities force the incumbents themselves to be more innovative and efficient.

The goal of inducing investment in competitive facilities is clearly reflected in Congress' creation of separate pricing standards for unbundled network elements under section 251(c)(3), as compared to resold incumbent services under section 251(c)(4). Had Congress intended that resold services be made available at "cost" pursuant to section 251(c)(3), it need not have created a separate statutory mechanism. Furthermore, the availability of resold services at the lower prices usually generated by section 251(c)(3)'s pricing standard would lessen the incentive for new entrants to build their own facilities.

Despite the FCC's rejection of requests to limit the use and pricing of combinations of network elements which are functionally equivalent to resold services (Pet. App. 242a-249a), ALTS and its members believed the Commission had not issued its final word on the important policy issue of the pricing of such elements because the FCC had left open several significant costing issues (cost of capital, depreciation, overhead allocations, etc.) for subsequent determination in individual cases.

This understanding proved unfounded on August 19, 1997, when the FCC issued its *Third Order on Reconsideration* in the *Local Competition* proceeding (the *Shared Transport Order)*, in which the Commission deliberately set the price of two important non-bottleneck UNEs -- local switching and

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[8](...continued)
Cong., 2d Sess. at 1 (1996)(emphasis supplied).

shared transport -- at levels that automatically flowed through all the incumbents' economies of scope and scale.[9]

The refusal by the FCC to recognize the fundamentally distinct policy concerns between the pricing of bottleneck and non-bottleneck facilities substantially altered ALTS and its members' understanding of Rule 51.315(b). Once the FCC's *Shared Transport Order* demonstrated that the FCC's pricing paradigm for bottleneck facilities would be applied indiscriminately to non-bottleneck network elements, Rule 51.315(b) became a requirement that incumbents provision certain existing combinations (those that resemble resold incumbent services) at prices that conflict with Congress' pricing standard for resold services, and which fail to provide appropriate incentives for competitive investment.

Accordingly, ALTS and its members now ask that Rule 51.315(b) be vacated and remanded to the FCC with instructions that: (1) the Commission remains free to adopt rules involving combinations which do not replicate resold services; and (2) any new rules should fully accommodate the need for the continued encouragement of investment in competitive facilities.

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[9] *In the Matter of Local Competition Provisions in the Telecommunications Act of 1996, Third Report and Order Upon Reconsideration*, CC Docket No. 96-98 (1997) ("*Shared Transport Order*"): "We note that incumbent LECs have significant economies of scope, scale, and density in providing transport facilities. *Requiring transport facilities to be made available on a shared basis will assure that such economies are passed on to competitive carriers*" (¶ 35; emphasis supplied).

SUMMARY

This Court should start its independent review of Rule 51.315(b) with a focused understanding of the Eighth Circuit's reversal. AT&T, MCI, and the government ("Petitioners"), as well as the incumbents, share an important assumption concerning the Eighth Circuit's logic. They each contend the order on rehearing prevents the FCC from requiring incumbents to provision *any* existing combination of network elements, including those combinations that are not functionally equivalent to services available from the incumbents via resale. Employing this broad reading, Petitioners attack the reversal of Rule 51.315(b) for "confusing" the physical unbundling of network elements with the unbundling of separate prices for those elements. The incumbents happily adopt this expansive interpretation of the decision, and vigorously defend it in the hope of being able to refuse new entrants' requests for any existing combination of network elements.

But this sweeping view incorrectly confuses the court's original determination that incumbents cannot be required to combine network elements (Pet. App. at 52a-53a) with the distinct issue presented in the October 14th Order -- the provision of combinations of elements that are currently combined (Pet. App. at 71a). Concerning the latter, the court's focus was not on the obligation "to recombine network elements that are purchased by the requesting carriers," but rather the manner in which Rule 51.315(b) destroyed the distinction between sections 251(c)(3) and 251(c)(4). Pet. App. at 71a.

Rule 51.315(b) indeed applies to all combinations: " ... an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines," but, correctly read, the Eighth Circuit's reversal of the rule in no way

implicates all the existing combinations of unbundled elements, only those combinations that so closely resemble resold services that the distinct pricing regimes imposed on each by the statute would be eliminated. As the Eighth Circuit explained: "The combined elements would be equivalent to resale under section 251(c)(3), yet priced at cost pursuant to section 251(c)(4)," a result that would "obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Pet. App. at 71a.

Nothing in the Eighth Circuit's language dealing with Rule 51.315(b) suggests the court was attempting to parse the meaning of "unbundled" as the long distance companies contend. While the Eighth Circuit pointed out that this "obliterat[ion]" would not be permissible even for combinations involving only two network elements, the logic of the court's opinion applies solely to combinations that effectively replicate resold incumbent services, and not to any of the many other existing combinations of network elements.

In addition to being the more natural and narrow reading of the holding below, this interpretation appreciably mitigates the practical concerns of the long distance companies and the government because it would permit the FCC upon remand from this Court to require the provisioning of all existing combinations of elements that do not replicate resold services.

In the event this Court does adopt the decision below on the broad interpretation offered by petitioners and the incumbents, ALTS and its members ask the Court to clarify that its action does not compromise other sources of statutory authority by which the FCC could order incumbents to provision specific combinations of network elements which do

not replicate resold services, including sections 251(c)(6), 214, and 271 of Title II of the Telecommunications Act.

ARGUMENT

I. Reversal of Rule 51.315(b) Implicates Only the Existing Combinations of Network Elements that Resemble Resold Services of the Incumbent Providers.

The many pages of argument in Petitioners' briefs devoted to the Eighth Circuit's reversal of Rule 51.315(b) obscure the short and simple ruling below (Pet. App. at 71a):

> "Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. §51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis."

Petitioners locate the Eighth Circuit's core holding in the first sentence above -- "Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis." They conclude from this sentence that the court's ruling is grounded on the belief that section 251(c)(3)'s reference to "unbundled" requires only the provisioning of physically separate elements, and does not require the provisioning of existing combinations of elements.[10] Having set up their target, they roll in their dictionaries and launch numerous salvos at the Eighth Circuit's asserted failure to understand that the word "unbundled" can also mean "separately priced."

But this effort to convert the October 14th decision into a misguided parsing of statutory language is totally unfounded. When the first sentence is read in context, it is clear the court was not grounding its reversal of Rule 51.315(b) on any particular meaning of "unbundled" as used in section 251(c)(3). Indeed, the word is never quoted, nor is there even a hint of textual analysis in this portion of the decision. Instead, the court's focus is upon the Rule's "obliterat[ion]" of the pricing distinctions mandated by Congress in situations where incumbents are required to provide existing combinations that resemble resold incumbent services.

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[10] For example, AT&T sees a confusion of the phase "unbundled" with "separated" or "uncombined" (AT&T Brief at 37). MCI claims the decision means that "any requirement that incumbents provide elements in combination violate[s] the statute" (MCI Brief at 15). *See also* Federal Petitioners' Brief at 44: "The Eighth Circuit invalidated Rule 315(b) principally on the ground that the language of Section 251(c)(3) 'requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis.'"

Nothing in the decision impairs the FCC's ability to issue rules concerning existing combinations that do *not* resemble resold services, and nothing suggests that section 251(c)(3) is not fully applicable to these combinations.

From start to finish, the Eighth Circuit's sole concern in rejecting Rule 51.315(b) is for the confusion it would produce between resale and unbundled network elements -- a concern that only applies to the existing combinations of elements that resemble resold services.

Beyond the fact that only a narrow view of the reversal of Rule 51.315(b) can be found in the Eighth Circuit's language, ordinary maxims requiring that appellate opinions be interpreted narrowly are underscored in the present context where a complex regulatory scheme is under review. A necessary consequence of the deference to administrative interpretations required under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), is that appellate reversals of agency action should be confined to the particular error identified.

Rule 51.315(b) is a broad rule that requires incumbents to provide requesting new entrants with any and all existing combinations of elements, including combinations which resemble the resold services of the incumbents. The Eighth Circuit upheld a facial challenge to this rule based on the need to preserve the statutory distinctions between resold services and those existing combinations which resemble them. But nothing in the Eighth Circuit's reversal can -- or should -- be interpreted as prohibiting the FCC from revisiting its rule, and requiring the incumbents to provide any and all existing combinations that are *not* similar to resold services. This Court should adopt the Eighth Circuit's understanding of Rule 51.315(b), and reverse and remand the Rule to the Commission for consideration of a new rule that would

exclude combinations resembling resold services.

II. The Eighth Circuit Is Correct that Rule 51.315(b) Would "Obliterate" the Statutory Distinction Between Resold Services and Network Elements.

Once the strawman characterization of the decision below has been cleared away, it is evident the Eighth Circuit was not required to show the "judicial deference to reasonable interpretations by an agency of a statute that it administers" (*National R.R. Passenger Corp.* v. *Boston & Maine Corp.* 503 U.S. 407, 417 (1992)), in light of the Commission's disregard in Rule 51.315(b) for the express statutory distinctions Congress created between the pricing of resold services and network elements. In particular, petitioners' extended discussion of the "discrimination" that allegedly results if existing combinations of elements are not made available at cost pursuant to Rule 51.315(b) is unpersuasive given Congress' express determination in section 251(c)(4) of the pricing standard for resold services. *See, e.g.*, AT&T Brief at 44-46; MCI Brief at 16-19. Furthermore, the few arguments raised by Petitioners that do relate to the Eighth Circuit's actual decision below concerning Rule 51.315(b) are unavailing.

First, Petitioners accuse the court of requiring "artificial" increases in "the cost of using network elements so that leasing network elements would not become a less costly way to enter local markets than resale" (MCI Brief at 22).

But nowhere in the decision below does the court order the FCC or the states to protect the statutory distinction between resold services and network elements solely through price increases on the latter. Indeed, the absence of any such requirement is underscored by the recent action of the New York Public Service Commission, which preserves this

distinction by imposing geographic, market segment, and sunset provisions on network elements that resemble resold services -- and not by imposing price increases on the underlying network elements.[11]

Second, Petitioners attack " ... the court's assumption that there would be an 'inherent' economic advantage in competing via combinations of elements rather than resale . . ." (MCI Brief at 23-24). But the word "inherent" never appears in the court's reversal of Rule 51.315(b), nor is there any assumption -- express or implicit -- that unbundled elements enjoy an economic advantage over resold services. Petitioners' lengthy discussion of how resold services can fully compete with unbundled elements might be apposite if the reviewing court were trying to handicap the different entry vehicle of resale and network elements. But the plain basis for the court's action was the need to preserve the separate statutory identity of each entry mode -- not to tweak the likelihood of success of either.

Third, Petitioners claim there are sufficient non-price distinctions between the resale and network element entry strategies to preserve their separate identity even if Rule 51.315(b) has the effect of destroying Congress distinct pricing scheme for each (AT&T Brief at 46-48; MCI Brief at 23; each citing the *Local Competition Order* at ¶¶ 332-34).[12]

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[11] *In the Matter of Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*, Case No. 97-C-0271 (NYPSC issued April 6, 1998).

[12] "We believe that sections 251(c)(3) and 251(c)(4) present (continued...)

The FCC paragraphs cited by Petitioners speak only to the non-pricing distinctions that would exist between "carriers using *solely* unbundled elements, compared with carriers purchasing services for resale" (¶ 332; Pet. App. at 244a emphasis supplied).[13] This observation might be entitled to deference if new entrants were actually divided between pure examples of resale entry as opposed to entry through network elements. However, the real world is very different from Commission's hypothetical. New entrants do not make a commitment between either resale or facilities-based entry on a company-wide basis, but rather they determine their entry strategies on a case-by-case basis according to their individual business strategies and the particular economic facts surrounding their entry decisions for specific markets, and sometimes even for specific customers. Thus, because almost all new entrants have the back office systems and financial

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[12](...continued)
different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors. We therefor find that it is unnecessary to impose a limitation on the ability of carriers to enter local markets under the terms of section 251(c)(3) in order to ensure that section 251(c)(4) retains functional validity ...." Pet. App. at 244a. In reaching this conclusion, the FCC identified the ability of competitors using "solely unbundled elements" to offer services that are different that those offered by incumbents as the "principal" distinction that preserved the statutory structure. *Id.*

[13] *See also* ¶ 333 (Pet. App. at 244a): "In contrast, a carrier offering services *solely* by recombining unbundled elements can offer services that differ from those offered by an incumbent" (emphasis supplied).

resources to employ either approach in a particular situation, their individual choices between combinations of network elements and resold services are indeed driven by price. The hypothetical model employed by the Commission might be pertinent if competitors were actually forced to choose entry strategies on an "either all this or all that" basis. However, because they actually make their decisions on a far more disaggregated basis, the FCC's attempt to save the statutory structure is not entitled to any deference.

In sum, the FCC's effort to repair its evisceration of section 251(c)(4) is not entitled to deference under *Chevron,* nor could it survive deferential review even if that standard were applicable.

III. Other Statutory Authorities Empower the FCC to Order the Provisioning of Combinations That Do Not Resemble Resold Services.

Even if this Court were to agree with Petitioners and the incumbents that the Eighth Circuit's reversal of Rule 51.315(b) encompassed all combinations of network elements, and not just those combinations that are interchangeable with resold incumbent services, ALTS and its members respectfully ask that the Court take care not to inadvertently cordon off other sources of Commission authority which enable it to order the provisioning of combinations of network elements which do not replicate resold services.

A. The FCC Plainly Has the Authority to Order the Provisioning of Combinations of Network Elements Pursuant to Section 251(c)(6).

Section 251(c)(6) was drafted by the House of Representatives and adopted by the Conference Committee to give the FCC jurisdiction over certain physical collocation

requirements that were called into question in *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).[14] The *Expanded Interconnection* proceedings that gave rise to *Bell Atlantic* had plainly encompassed the provisioning of what was then the central office equivalent of unbundled network elements -- co-location space, emergency power, cross-connects, etc.[15] Even if this Court were to uphold the Eighth Circuit on the jurisdictional issue and also were to affirm the Eighth Circuit's reversal of Rule 51.315(b) on the broad reading offered by the other parties, this Court should be careful not to compromise the FCC's plenary power to order the provisioning of combinations of network elements pursuant to section 251(c)(6).

B. The FCC Has the Authority to Order Combinations Of Network Elements Under Section 214.

The federal courts have long recognized the FCC's broad authority to condition the issuance of a certificate of convenience and necessity pursuant to section 214. As the incumbents request authority to add to their interstate

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[14] H.R. Rep. No. 104-104 at 73 (1995)("Finally, this provision [which became section 251(c)(6)] is necessary to promote local competition because a recent court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See *Bell Atlantic Tel. Co. v. Federal Communications Commission*, No. 92-1619 (D.C. Cir. June 10, (1994))").

[15] *In the Matter of Expanded Interconnection with Local Telephone Co. Faciliities*, 8 FCC Rcd 7369, 7390 (1992)(requiring incumbents to provide central office space and facilities upon an interconnector's request).

investments, the Commission clearly retains the power to require the incumbents to provision those combinations of existing elements that do not replicate resold incumbent services. *See, e.g., MCI v. AT&T*, 462 F. Supp. 1072, 1087 n.14 (N.D. Ill. 1978)("Thus, the FCC may prescribe competitive conditions in the exercise of its authority under Section 214 to grant construction permits for telecommunications facilities").

C. The FCC Has the Authority to Order Combinations of Network Elements Under Section 271.

Section 271 targets a core policy concern of the 1996 Act, the ability of the Bell Operating Companies to exploit their market control over local telecommunications. In order to protect long distance markets from any intrusion of this market power, and to insure that local markets are expeditiously opened to competition, section 271 and its related sections contain detailed provisions about the manner in which the Bell companies can enter long distance.[16]

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[16] *See, e.g., Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231 (released February 4, 1998); *Application by BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208 (released Sept. 30, 1997); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (released Aug. 19, 1997); *Application by SBC* (continued...)

Among the checklist requirements contained in section 271(c)(2)(B)(i) is the requirement that the Bell operating companies provide interconnection in the manner specified by sections 251(c)(2) and 252(d)(1). If this Court agrees that the Commission does have the authority to implement these stautory provisions, then this delegation of authority clearly encompasses the power to order the provisioning of existing combinations of network elements that do not replicate resold services.

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[16](...continued)
Communications Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685 (1997).

CONCLUSION

For the foregoing reasons, the Court should reverse Rule 51.315(b) and remand the rule to the FCC with instructions that: (1) the Commission remains free to adopt rules involving combinations which do not resemble resold services; and (2) any new rules should fully accommodate the need for continued investment in competitive facilities.

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